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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

— v. —

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

On Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Can the constitutional requirement that evidence of actual malice in a public-figure libel case be "clear and convincing" be disregarded for purposes of a defendant's motion for summary judgment?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. The Investigator Publishing Company is a Texas corporation. It does not have any subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 746 F.2d 1563 (D.C. Cir. 1984). The opinion of the District Court is reported at 562 F. Supp. 201 (D.D.C. 1983).

JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1) (1982). Petitioners' petition for a writ of *certiorari* was granted by this Court on June 3, 1985.

STATUTORY PROVISION INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> *Motion and Proceedings Thereon*. The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(c).

STATEMENT OF THE CASE

Petitioner Jack Anderson is a well-known reporter and publisher. In 1981, he served as publisher of a now defunct magazine called *The Investigator*, owned by petitioner Investigator Publishing Company. Petitioner Adkins was President and Chief Executive Officer of the Company.

Respondent Liberty Lobby, Inc. is a self-styled political action organization, whose stated aims are to "advocate[] and promote[] patriotism, nationalism, lawfulness [and] protection of the national interests of the United States and the economic interests of its citizens. . . ." (J.A. 12 [Complaint, Count One, ¶12].) Respondent Willis A. Carto is Liberty Lobby's founder and Treasurer. Since its inception in 1955, Liberty Lobby has been engaged in political lobbying and the dissemination of its views on what have been delicately described as "highly controversial subjects."[1]

Carto and Liberty Lobby disseminate their views through their own extensive media network. In 1981, this network included *The Spotlight*, a national newspaper with 345,000 subscribers; "This is Liberty Lobby," a daily radio commentary broadcast on 460 radio stations; and a weekly television program broadcast on 30 stations. Liberty Lobby also sells, publishes or distributes a multitude of publications, including "Debunking the Genocide Myth"; "The Hoax of the Twentieth Century"; "The White Paper on the ADL"; and *Imperium*, a book written by Francis Parker Yockey, for which Carto wrote a lengthy introduction.

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1. Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968). In that case, the present respondents unsuccessfully sought to enjoin Anderson and the late Drew Pearson, from publishing a newspaper column based on certain Liberty Lobby documents. Liberty Lobby's chairman had previously sued Anderson and Pearson for libel, claiming that an article charging him with anti-Semitism had defamed him. The court awarded summary judgment to Anderson and Pearson on the ground that the column was substantially true. Dall v. Pearson, 246 F. Supp. 812 (D.D.C. 1963).

The October 1981 issue of the *The Investigator* included articles titled "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles described Liberty Lobby and Carto as fascist, neo-Nazi, anti-Semitic and racist. Respondents filed a diversity action in the United States District Court for the District of Columbia, claiming that thirty passages in the articles had defamed them. The complaint sought $2 million in general damages and $22 million in punitive damages.[2]

In the year and a quarter granted for discovery,[3] respondents deposed, among other persons, Anderson and Charles Bermant, the author of the articles.[4] Prior to Bermant's deposition, respondents were provided an affidavit by Bermant, describing the steps he had taken in researching and writing the articles, together with a 43-page appendix setting forth in detail the sources on which he had relied for each of the thirty allegedly defamatory statements. Respondents were also provided access to a box of written materials that Bermant had gathered during his research. (J.A. 44-45 [Bermant Aff. ¶ 11].)

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2. The complaint originally named two additional defendants, who were subsequently dismissed under Rule 41(a). In addition to the defamation claim, the complaint also charged Anderson alone with unlawful conversion of certain Liberty Lobby files. The District Court granted Anderson summary judgment on this claim, holding that the claim was barred by the statute of limitations. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 210 (D.D.C. 1983). Respondents did not appeal.

3. The District Court initially ordered that discovery be completed by September 30, 1982, but later extended the discovery cut-off to October 15, 1982.

4. The articles were also accompanied by an introduction, captioned "Did *Mein Kampf* Spawn Yockey's *Imperium*, A Book Revived by Carto's Liberty Lobby?" This introduction, signed "The Editors," was written by Anderson based on materials supplied by Bermant. (J.A. 232 [Bermant Dep. Tr. 17].)

Bermant's affidavit and attachment and the depositions collectively establish the following facts, none of which respondents subsequently controverted by affidavits or otherwise:

After receiving a journalism degree and working as a newspaper reporter for several years, Charles Bermant began editorial duties for *The Investigator* in March 1981. (J.A. 43-44 [Bermant Aff. ¶¶ 2,4,5-7].)[5] In April, Liberty Lobby and Carto attracted widespread attention when it was revealed that Warren Richardson, a nominee for Assistant Secretary of Health and Human Services, had previously served as Liberty Lobby's general counsel.[6] In May 1981, Bermant was assigned to work on articles on Carto and Yockey.

Bermant spent over a month working on the articles. His first step was to file requests with several government agencies under the Freedom of Information Act, 5 U.S.C. § 552, from which he ultimately received more than a thousand pages of documents and newspaper clippings. (J.A. 44 [Bermant Aff. ¶¶ 9,10].) He collected additional published materials about Liberty Lobby, Carto and Yockey from Anderson's office files, newspaper files and libraries, including the Library of Congress. (*Id.*) These materials included articles that had previously been published in the *National Review*, the *Washington Post*, the *Washington Star*, the *Los Angeles Times*, and *True* magazine, as well as statements in the *Congressional Record*. Bermant also read Carto's introduction to *Imperium*, and much of the book as well. (J.A. 44-45 [Bermant Aff. ¶11].)

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5. In addition to writing, these duties included answering telephone inquiries from writers who had story ideas, and requesting the writers to send him written materials for his evaluation and possible use. (J.A. 261 [Bermant Dep. Tr. 71].)

6. Although Mr. Richardson subsequently condemned as "morally repugnant" what he termed Liberty Lobby's "anti-Jewish, racist actions," his nomination was ultimately withdrawn. "Health Post Choice Withdraws Amid Controversy," N.Y. Times, Apr. 26, 1981, at A21, col. 1; "Liberty Lobby's Ex-Lawyer Ends HHS Quest," Washington Post, Apr. 25, 1981 at A1.

After reviewing this written material, Bermant contacted personnel at the Anti-Defamation League and the Federal Election Commission and also undertook numerous personal and telephone interviews. (J.A. 44 [Bermant Aff. ¶ 10].) Bermant also spoke with a freelance author named Robert Eringer, who told him that he had recently completed a story about Liberty Lobby. (J.A. 261 [Bermant Dep. Tr. 70-71].) At Bermant's request, Eringer mailed a draft of the article, together with a book he had published and investigatory articles he had written on other subjects. (J.A. 262 [Bermant Dep. Tr. 71].) Bermant checked Eringer's article against other published sources and used portions of this material in his article, for which Eringer was paid $250.[7] Answers of Defendant The Investigator Publishing Co. to First Set of Plaintiffs' Interrogatories at 3, 6, 7.

Bermant also interviewed and received court documents from William Cox, an attorney who was representing a plaintiff in litigation against an alleged Carto "front" organization.

Bermant tried several times to secure an interview with Carto, but his repeated telephone calls went unanswered. (J.A. 45 [Bermant Aff. ¶ 13].) He was, however, allowed to conduct a lengthy interview with the chairman of Liberty Lobby's Policy Board. (*Id.*)

Bermant's affidavit stated that he continued to believe that the challenged articles were true and accurate, just as he had at the time he wrote them. (J.A. 46 [Bermant Aff. ¶ 20].) Anderson testified that he had relied on Bermant for the accuracy of these articles. (J.A. 212-13 [Anderson Dep. Tr. 101].)

Petitioners then moved for summary judgment on the ground that respondents were public figures and could not show with the "convincing clarity" required by *New York*

7. It was Anderson's policy to pay for information only if the recipient was "a professional newsman, who was doing a professional job." (J.A. 199 [Anderson Dep. Tr. 76].)

Times Co. v. Sullivan, 376 U.S. 254 (1964), and subsequent cases, that the challenged articles had been published with knowledge that they were false or that petitioners "in fact entertained serious doubts" as to their truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Petitioners also argued that respondents were "libel proof" because Liberty Lobby's reputation had already been irreparably tarnished by twenty years of articles and other public comments repeatedly accusing them of anti-Semitic and racist views and activities.

Respondents filed three affidavits in opposition to the motion, after having been granted an extension of time in which to undertake further discovery.

The District Court ruled that "[t]he material underlying facts necessary for disposition of this motion . . . are uncontested," 562 F. Supp. at 205, and granted petitioners' motion for summary judgment on the entire complaint.[8] After examining Bermant's affidavit and the accompanying 43-page appendix, the District Court found that "as a matter of law the information contained within these sources substantiates each allegation contained in the articles." 562 F. Supp. at 209. The court held that the respondents' three affidavits had done no more than controvert the truth or even-handedness of some of the allegations made by the sources on which Bermant had relied. Such a showing, the District Court held, was insufficient to create a factual issue of malice, especially in light of petitioners' "finely etched effort presenting in careful detail the journalistic research underlying each statement." *Id.* The District Court found further support for its conclusion in "the reality that plaintiffs manage to attack only a small proportion of the sources that defendants relied upon." *Id.*

The Court of Appeals reversed the District Court's judgment as to nine of the thirty allegations of defamation.

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8. As noted above at note 2, the District Court held that respondents' conversion claim against Anderson was time-barred, a holding from which respondents did not appeal.

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984). Although respondents no longer questioned their status as public figures, and must, therefore, under *New York Times* and *St. Amant* carry the burden *at trial* of establishing with "convincing clarity" that the alleged defamatory statements about them had been published with "actual knowlege" of their falsity or with "serious doubt" about their truth, the Court of Appeals held that a lesser showing was sufficient to avoid a summary judgment. Similarly, while the Court of Appeals recognized that, under *Bose Corp. v. Consumers Union of United States, Inc.*, ____ U.S. ____, 104 S. Ct. 1949 (1984), courts must "independently decide" at the trial stage whether the *New York Times-St. Amant* showing had been made, it held that such an "independent judicial determination" was "incompatible with the preliminary nature of the summary judgment inquiry." 746 F.2d at 1571.

While rejecting the "convincing clarity" standard and the "independent judicial determination" requirement at the summary judgment stage, the Court of Appeals nevertheless held, on the basis of the affidavits and other materials submitted by the parties, that no reasonable jury could find actionable twenty-one of the articles' allegations. These included, among others, that Carto is "anti-Semitic," "hides in the shadows of reclusion and anonymity," and is a "Hitler fan"; that a $50,000 "reward" offered to anyone who could prove the existence of the Holocaust was a "gimmick"; that Liberty Lobby was a "nest of Nazis"; and that Liberty Lobby had violated federal election laws.[9]

With respect to the remaining allegations, the Court of Appeals held respondents were not "libel proof" and that under its reduced standard for determining what issues to send to trial "a jury could reasonably conclude" that the

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9. These allegations were variously held to be nondefamatory, 746 F.2d at 1572; constitutionally protected opinion, *id.*; or based upon "reputable sources" whose reliability petitioners had no reason to doubt, *id.* at 1576. Respondents have not challenged the propriety of summary judgment as to any of these allegations.

articles were published with actual knowledge of their falsity or with disregard for their truth or falsity. 746 F.2d at 1577-78. The appellate court therefore reversed the grant of summary judgment and remanded to the District Court for trial on these allegations. *Id.* at 1579. After a petition for rehearing with a suggestion for rehearing *en banc* was denied, petitioners sought a writ of *certiorari*, which was granted by this Court on June 3, 1985.[10]

SUMMARY OF ARGUMENT

The First Amendment mandates that a public-figure libel plaintiff may not prevail at trial unless he or she demonstrates with "convincing clarity" that the allegedly defamatory statement was made with "actual malice." This heightened burden of proof is necessary to ensure the robust discussion of public issues crucial to our democracy.

By ignoring this mandate at the summary judgment stage, the Court of Appeals created a special rule disadvantaging libel defendants on summary judgment. This rule is as unsupported by precedent as it is by logic. In all areas of the law, civil and criminal, it is firmly established that a plaintiff's ultimate burden of proof must be taken into account in determining whether his or her claim should be submitted to a jury. This is true in the libel area as well. The standard for granting summary judgment under Rule 56(c), that "there is no genuine issue as to any material fact," as well as that Rule's purpose "to pierce the allegations" of "notice" pleadings, is identical to that for directed verdict and therefore requires that a court's determination of whether there is a genuine need for trial incorporate the heightened burden of proof imposed on public-figure plaintiffs.

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10. Although the petition sought review on the "libel-proof" issue as well, *certiorari* was limited to the issue of whether the constitutional requirement that evidence of actual malice in a public-figure libel case be "clear and convincing" can be disregarded for purposes of a defendant's motion for summary judgment.

In adopting its special rule for libel cases, the Court of Appeals disregarded the fundamental principles underlying summary judgment. Summary judgment is designed to assess the proof that the parties could muster at trial. It is grounded in the policies of the Federal Rules of Civil Procedure that contemplate liberal discovery. Consequently, there is no basis for making summary judgment the truncated process the Court of Appeals thought it should be in libel cases. The Court of Appeals' approach would lead to needless and wasteful trials in cases in which it is clear that a party could not ultimately prevail.

In evaluating summary judgment motions in actual malice cases, other courts have consistently incorporated a public-figure plaintiff's heightened burden of proof, while still continuing to afford nonmoving parties the traditional protections due on summary judgment. Application of this neutral summary judgment rule implies no special protections for libel defendants beyond the constitutional protections embodied in the substantive laws, and it neither compels nor forbids the award of summary judgment in appropriate cases. As this Court and other federal courts have recognized in a variety of settings, summary judgment is not inappropriate merely because the state of mind or credibility of witnesses is alleged to be at issue. And, in any event, this Court's recognition of the special need for independent judicial scrutiny of issues of constitutional fact should apply with equal force to summary judgment determinations in public-figure libel cases.

The District Court's award of summary judgment to petitioners was correct because respondents failed to adduce any evidence, let alone "clear and convincing evidence," that petitioners' articles were published with "actual malice." The Court of Appeals found that a barrage of grave allegations going to the heart of respondents' operation came from reputable sources, and could lead no reasonable jury to doubt petitioners' belief that the picture of respondents as Hitler-inspired racists and anti-Semites was accurate. In light of these findings, no reasonable jury

could doubt petitioners' lack of "actual malice" in publishing the remaining allegations, which merely provided details of the larger picture.

Even if examined without reference to the substantially similar allegations on which summary judgment was upheld, nothing about the content of, or the sources for, the remaining allegations provided any "obvious reason to doubt" their reliability. Petitioners' sources for the information afforded no basis for doubting the reliability of those sources, especially in light of their corroboration by numerous other highly reputable sources. Moreover, the information itself was far from being "so inherently improbable that only a reckless man would have put [it] in circulation." Thus, there was no basis for the Court of Appeals' conclusion that a reasonable jury "could" find evidence of actual malice even on the improperly reduced standard the court applied.

ARGUMENT

I. Summary Judgment Must Be Awarded To A Defendant Unless A Public-Figure Plaintiff Has Adduced Evidence From Which A Reasonable Jury Could Find, With Convincing Clarity, That The Defendant Acted With Actual Malice.

A. The First Amendment Requires A Public-Figure Libel Plaintiff To Demonstrate With Clear and Convincing Evidence That A Defamatory Statement Was Made With Knowledge That It Was False Or With Reckless Disregard For Its Truth Or Falsity.

Twenty-one years ago, this Court held that common law principles governing defamation were inadequate to assure that the freedoms of speech and press have the " 'breathing space' that they 'need to survive'." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In order to "insure the ascertainment and publication of the truth

about public affairs," this Court concluded that erroneous publications, as well as truthful ones, must be granted First Amendment protection. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). The Court held that "neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." *Id.*

These policies, this Court held, require that a public figure may recover for an allegedly defamatory statement only upon a showing that the statement was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. at 279-80. And, as a further safeguard, the Court required that this showing be made with "the convincing clarity which the constitutional standard demands." *Id.* at 285-86. *See also Herbert v. Lando*, 441 U.S. 153, 170 (1979); *Bose Corp. v. Consumers Union of United States, Inc.*, _____ U.S. _____, 104 S. Ct. 1949, 1965 (1984).

When the consequences of an erroneous verdict may destroy precious freedoms, this Court has refused to tolerate the risk of error inherent in the ordinary "preponderance of the evidence" standard. Instead, the Court has ruled that the risk of an erroneous decision must be further limited by imposing on the plaintiff the extraordinary burden of establishing its case by "clear and convincing" evidence. *See, e.g., Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

In First Amendment cases, the "convincing clarity" standard is based on the recognition that "the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." *Bose v. Consumers Union*, _____ U.S. at _____, 104 S.Ct. at 1961. The constitutional requirement that libel judgments on behalf of public figures must be supported by

"clear and convincing" evidence is based on the same considerations of public welfare that underlie the requirement that public figures establish "actual malice": any lesser showing "dampens the vigor and limits the variety of public debate." *New York Times v. Sullivan*, 376 U.S. at 279. When public debate is involved, the damage to society from an erroneous verdict for the plaintiff is far greater than in ordinary tort litigation, where an erroneous verdict in favor of one party is considered no more serious than an erroneous verdict in favor of the other. Only last year, in *Bose v. Consumers Union*, this Court again reaffirmed the "convincing clarity" requirement as one of the fundamental safeguards of "the precious liberties established and ordained by the Constitution." ____ U.S. at ____, 104 S. Ct. at 1965.

B. A Plaintiff's Heightened Burden Of Proof Must Be Considered In Determining A Motion For Directed Verdict.

The Court of Appeals recognized that unless a public figure adduces "clear and convincing evidence" of actual malice, a jury may not consider the case, and a directed verdict must be entered for the defendant. 746 F.2d at 1571. This recognition was unquestionably correct, for it is well settled that the creation of an extraordinary burden of proof carries with it the "concomitant duty . . . to consider the applicable burden when deciding whether to send a case to the jury." *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972) (Friendly, C.J.).

This principle has been routinely applied in civil cases, where courts have evaluated a motion under Rule 50 for a directed verdict or for judgment n.o.v. in light of the "clear and convincing evidence" burden that must be met at trial. *See, e.g., United States Fire Ins. Co. v. Royal Ins. Co.* 759 F.2d 306, 312 (3d Cir. 1985) (fraud; directed verdict for defendant); *Roginsky v. Richardson-Merrell, Inc.*, 378

F.2d 832, 850-51 (2d Cir. 1967) (punitive damages; directed verdict for defendant).

The same principle is the "prevailing criterion" in criminal cases, where courts must evaluate a motion for judgment of acquittal in light of the prosecution's burden of proving at trial guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 n.11 (1979).[11]

Thus, even where the special protections afforded by the First Amendment are not relevant, the decision whether to refer a case to a jury must draw its content from the ultimate standard of proof at trial.

C. The Standard For Summary Judgment Under Rule 56 Is Identical To That For Directed Verdict And Therefore Incorporates A Public-Figure Plaintiff's Heightened Burden Of Proof.

Despite its recognition of the rule that courts must consider the applicable burden of proof in deciding whether to send a case to the jury, the Court of Appeals held, without citing any supporting authority,[12] that district courts must ignore the plaintiff's burden of proof at the summary judgment stage. This holding is as devoid of logic as it is unsupported by authority.

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11. United States v. Davis, 562 F.2d 681, 683-84 (D.C. Cir. 1977), cited by the Court of Appeals (746 F.2d at 1571) merely reaffirms this well-established principle. It provides no support for distinguishing between the standards for summary judgment and directed verdict in *civil* cases. That " 'probable cause' is sufficient to take the case to trial" in a *criminal* case (746 F.2d at 1571, citing Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983)) is beside the point. The criminal law provides no procedure equivalent to civil law's summary judgment for pre-trial challenges to the adequacy of the prosecution's case. *See* Costello v. United States, 350 U.S. 359 (1956).

12. As noted above at note 11, the authorities cited by the Court of Appeals either are irrelevant to summary judgment or reaffirm the rule governing directed verdict. To the extent that the Court of Appeals relied on Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970), this reliance is simply bewildering. *See infra* note 16.

As the Advisory Committee on Civil Rules of Practice and Procedure of the Judicial Conference of the United States emphasized with respect to Rule 56, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof *in order to see whether there is a genuine need for trial*." 31 F.R.D. 621, 648 (1962) (emphasis added).

The language of Rule 56 provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard for granting summary judgment must be applied in light of a party's ultimate burden of proof at trial. Under Rule 56, a factual dispute is only "genuine" and "material" when the nonmoving party provides "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

It has therefore been widely recognized, both by this Court and by respected commentators (including the principal author of the Federal Rules), that the standards applicable to motions for summary judgment and motions for a directed verdict under Rule 50 are the same. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944); C. Clark, Code Pleading § 88, at 566 (2d ed. 1947); Louis, "Federal Summary Judgment Doctrine: A Critical Analysis," 83 Yale L.J. 745 (1974); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.02[10], at 56-43 to 56-44, ¶ 56.04[2], at 56-74 to 56-75, ¶ 56.15[3], at 56-479 to 56-480 (2d ed. 1985) [hereinafter cited as Moore's Federal Practice]; 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2712, at 569-71 (2d ed. 1983) [hereinafter cited as Wright & Miller]; *see generally*, Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D.

465, 482 (1984) ("[i]n effect the opposing party must rebut the moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. for the moving party" (footnote omitted)) [hereinafter cited as Schwarzer].

As these authorities recognize, both motions look to the existence of questions of material fact to be resolved by the jury and seek to remove from the fact finder those cases in which there is no legitimate controversy under applicable law. *See, e.g., United States v. General Motors Corp.*, 518 F.2d 420, 442 (D.C. Cir. 1975) (where "the established facts and relevant presumptions would have entitled [the moving party] to a directed verdict at trial, he is entitled to a summary judgment under Rule 56"). The purpose of both the summary judgment and directed verdict procedures -- to weed out unnecessary trials -- would be subverted by permitting a jury to resolve issues that could not alter a court's ultimate disposition of a case on the law.

In determining whether a trial is "necessary," for the purposes of Rule 56, courts have imposed significant limitations to assure that parties are not denied a reasonable opportunity to present their case at trial. They have therefore placed upon the moving party the burden of demonstrating that there are no genuine issues of material fact and have required that all disputed facts and inferences must be construed "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But the formidable burden that movants must meet is no different from the burden imposed on a party who seeks a directed verdict. *See* 5A Moore's Federal Practice, *supra*, ¶ 50.02[1], at 50-26.

To be sure, entry of summary judgment deprives the nonmoving party of his "day in court," but neither the interests of the litigants nor those of the judicial system are well served by "exposing the litigants to unnecessary delay, work and expense in going to trial when the trial judge

would be bound to direct a verdict in movant's favor after all evidence is adduced." *Chambers v. United States*, 357 F.2d 224, 227 (8th Cir. 1966).

That directed verdicts are entered after the plaintiff has had an opportunity to complete discovery and marshal his or her evidence in a trial is likewise no reason for tolerating a lesser showing by the plaintiff at the summary judgment stage than at trial. Rule 56(f) gives a party opposing summary judgment ample opportunity to complete discovery and marshal the evidence so that he or she can present sufficient facts to justify a trial.[13]

In the present case, respondents were granted an extension of time in which to conclude discovery before opposing petitioners' motion; they sought no additional evidence to oppose the motion. There is no reason to allow respondents to go forward with a case that could not be submitted to the jury. To do so would be to encourage an exercise in futility, wasteful not only to the litigants, but to the courts and to other litigants whose claims must be deferred while the empty ritual of a hopeless trial is played out. Justice Frankfurter's remarks on the same subject are particularly appropriate:

> The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.

Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring).

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13. Fed. R. Civ. P. 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

D. The Court Of Appeals Misconceived The Nature And Purpose Of Summary Judgment.

The rationale advanced by the Court of Appeals to support its unprecedented restructuring of the summary judgment rule does not comport with the purpose of Rule 56 or modern practice under that rule.

The Court of Appeals stated: "Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." 746 F.2d at 1570. That such a consequence should be of concern lays bare the Court of Appeals' misunderstanding of the purpose of summary judgment. An evaluation of the weight of the defendant's uncontroverted facts is precisely the inquiry mandated by Rule 56(c) to determine, under the language of that rule, if "the moving party is entitled to a judgment as a matter of law" when no disputed material facts are found to exist. *See* 10 Wright & Miller, *supra*, § 2712, at 571-73. Moreover, summary judgment is not properly "a search for a minimum of *facts* supporting the plaintiff's case," but rather is a search for those *contested* facts which, if found to be as alleged by a nonmoving party, would permit a jury to find for that party at trial.

The Court of Appeals' concern that recognition of a heightened burden of proof on summary judgment would "force the plaintiff to try his entire case" prematurely "in pretrial affidavits and depositions," 746 F.2d at 1570, is similarly ill founded. Rule 56(e) was amended in 1963 to require that, "[w]hen a motion for summary judgment is made . . ., an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or . . . otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial." It is black letter law, based upon this provision, that a party opposing a summary judgment motion may not sit back and

withhold proof of his or her claims until trial; nor may that party defeat a motion on the basis of materials that are "conjectural" or "speculative" as to what the proof at trial may demonstrate. 6 Moore's Federal Practice, *supra*, ¶ 56.15[3], at 56-485 to 56-488; 10A Wright & Miller, *supra*, § 2739, at 521-22 ("the party opposing the summary judgment motion does not have the right to withhold his evidence until trial; nor can he demand a trial because of the speculative possibility that a material issue of fact may appear at that time" (footnote omitted)).

Contrary to the Court of Appeals' suggestion, full development of the evidentiary support for claims prior to trial is one of the basic features of a summary judgment motion and that which distinguishes it from a motion to dismiss on inadequate pleadings. 6 Moore's Federal Practice, *supra*, ¶ 56.09, at 56-165 to 56-168. Indeed, as Judge Clark, the primary author of the Federal Rules, has explained, one of the central purposes of summary judgment is to "serve[] as an instrument of discovery . . . to call forth quickly the disclosure on the merits of either claim or defense on pain or loss of the case for failure to do so." Clark, Code Pleading, *supra*, § 88, at 566. Where, as here, a party opposing a summary judgment motion has had an ample opportunity for discovery, this Court and others have required that the party must demonstrate a genuine issue of material fact at the summary judgment stage or its claim will fail. *See, e.g., Cities Service Co.*, 391 U.S. at 298-99; *Time, Inc. v. McLaney*, 406 F.2d 565, 571-73 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

The Court of Appeals' concern that holding a public figure to the constitutional burden of proof at the summary judgment stage would be at odds with "the relatively quick process [summary judgment] is supposed to be," 746 F.2d at 1570, is yet another instance of that court's misconception of the fundamental principles that underlie summary judgment. Summary judgment is designed to avoid the expense and delay of unnecessary trials. Rule 56 is not limited to "simple" cases; even where voluminous materials must

be evaluated, summary judgment is far quicker than a lengthy trial. As an experienced trial judge has recognized, the summary judgment process may be "particularly appropriate for complex litigation." Schwarzer, *supra*, 99 F.R.D. at 476.

This Court has approved the award of summary judgment, even in complex antitrust cases containing voluminous records arising out of years of discovery. In *Cities Service Co.*, for example, this Court affirmed the grant of summary judgment in a complex antitrust action in which there had been years of extensive discovery.[14] Similarly, in *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), the court granted summary judgment after eight years of discovery in a complex class action brought by bank charge card holders on an allegation of conspiracy to fix the rate of interest charged for extended payment privileges on credit card purchases.

Additionally, to imply, as does the Court of Appeals, that a liberal discovery process is somehow wasteful, ignores the enormous waste of unnecessary trials that summary judgment was designed to prevent. That Rule 56 may give district courts some discretion to deny summary judgment in unusually complex cases, *see* Schwarzer, *supra*, 99 F.R.D. at 475 n.53, is hardly reason for reversing the award of summary judgment where the trial court has determined that the issues were not sufficiently complex to merit a trial.

In any event, the considerations of judicial efficiency that may come into play in evaluating the propriety of summary judgment in complex cases are wholly inapplicable in the present case. Petitioners' motion was supported by two affidavits and a forty-three page appendix; respondents' opposition consisted of three short affidavits. Even if the few

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14. The petitioner and his associates were deposed for a total of 153 days over five and one-half years. 391 U.S. at 263.

hundred pages of deposition transcript are added to this record, it is hardly enough to impose a significant time burden on a busy trial or appellate judge.

The final policy ground cited by the Court of Appeals is equally fallacious. The court argued that, "courts of appeals would be burdened with the unusual task of making the largely factual determination of actual malice in many cases where a judge or jury verdict against the plaintiff would render that unnecessary." 746 F.2d at 1731. That a jury might ultimately find for the defendant and thus save an appellate court's time on appeal is no excuse for requiring the defendant to undergo an unnecessary trial. *See Jackson v. Virginia*, 443 U.S. 307, 318 n.10 (1979). If, under the *New York Times* standard, a reasonable jury could not enter a judgment for the plaintiff, the defendant is entitled to summary judgment.

E. This Court's Dictum In Footnote Nine Of *Hutchinson v. Proxmire* Suggests No Special Rule Disfavoring Summary Judgment In Public-Figure Libel Cases.

As discussed above, where the substantive law requires a plaintiff to carry an extraordinary burden of proof at trial, a summary judgment determination must take this heightened burden into account. The Court of Appeals erroneously read this Court's dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), to provide a basis for adopting a different rule in libel cases. In *Hutchinson*, this Court held that the plaintiff was not a "public figure," and it therefore had no occasion to rule on the propriety of summary judgment on the question of "actual malice." However, since the District Court had expressed the view that First Amendment concerns may make summary judgment the "rule" in libel cases, this Court felt "constrained to express some doubt about the so-called 'rule.'" *Id.* *Hutchinson's* dictum implies no more than that no "special procedural protections [apply] to defendants in libel and

defamation actions *in addition to the constitutional protections embodied in the substantive laws;*" and that "no special rules apply for summary judgment." *Calder v. Jones*, _____ U.S. _____, 104 S. Ct. 1482, 1488 (1984) (emphasis added).[15] *Hutchinson* therefore provides no basis whatsoever for the creation of a "special rule" relieving libel plaintiffs of the burden plaintiffs must carry in other summary judgment cases generally, where the law has imposed on them an extraordinary burden of proof at trial.

Before *Hutchinson*, some courts had assumed that *New York Times* required tilting the scales towards defendants in libel cases.[16] Other courts had explicitly adopted the same neutral standard suggested by *Hutchinson*: "*The standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 441 (9th Cir.) (emphasis in original), *cert. denied*, 419 U.S. 872 (1974). Both before and after *Hutchinson*, most courts have routinely applied traditional summary judgment principles in libel cases, while giving due regard to the extraordinary burden that a public-figure libel plaintiff must carry under *New York Times*.[17] Under these principles, "[t]here

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15. It is well established that burden of proof is part of the "substantive laws" to which *Calder* adverts. *See* Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Central Vermont Ry. Co. v. White, 238 U.S. 507 (1915).

16. *E.g.*, Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (trial judge, in determining whether a plaintiff has demonstrated actual malice by clear and convincing evidence, should evaluate evidence in most reasonable light, and not in light most favorable to nonmoving party) (concurring opinion), *cert. denied*, 398 U.S. 940 (1970).

17. Courts applying these principles in the public-figure defamation context have widely held that plaintiffs must demonstrate genuine issues of material fact with "convincing clarity" or by "clear and convincing evidence" to avoid the entry of summary judgment. *See, e.g.*,

must be proof from which a reasonable jury acting reasonably *could* find actual malice by *clear and convincing evidence* before a plaintiff can survive summary judgment. If there are disputed facts which if resolved in the plaintiff's favor would not establish actual malice with convincing clarity, then they are not material and judgment will be granted for the defendant." *Nader v. de Toledano*, 408 A.2d 31, 49 (D.C. 1979) (emphasis in original; citations omitted), *cert. denied*, 444 U.S. 1078 (1980).

Application of a neutral summary judgment rule in libel cases neither compels nor forbids the award of summary judgment in appropriate cases. Many courts have denied summary judgment when plaintiffs have brought forward evidence of "actual malice" that a reasonable jury could find "clear and convincing." *See, e.g., Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1979); *Nader v. de Toledano*, 408 A.2d at 51-54. However, where a plaintiff fails to develop such evidence after ample opportunity for discovery, courts applying traditional summary judgment principles have concluded that there is no reason to put the defendant to the needless expense of preparing for trial. *See, e.g., Brown v. Herald Co.*, 698 F.2d 949 (8th Cir. 1983); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839

NOTES *(Continued)*

Brown v. Herald Co., 698 F.2d 949 (8th Cir. 1983); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2nd Cir.), *cert. denied*, 449 U.S. 839 (1980); Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872, (1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922, (1969); Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

(1980); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

That the "actual malice" test may involve an appraisal of the defendant's state of mind does not mean that a plaintiff is entitled to get to the jury. Indeed in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court reinstated a directed verdict for the defendant on this issue. And, in many other settings, both this Court and other courts have affirmed the propriety of summary judgment in cases whose resolution turns on the defendant's state of mind. *See, e.g., First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) (summary judgment for defendant in antitrust conspiracy claim); *Otteson v. United States*, 622 F.2d 516 (10th Cir. 1980) (affirming grant of summary judgment to defendant as to existence of willful or malicious conduct under the Federal Tort Claims Act); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978) (antitrust conspiracy), *cert. denied*, 440 U.S. 982 (1979); *Walker v. American Motorists Ins. Co.*, 529 F.2d 1163 (5th Cir. 1976) (affirming grant of summary judgment to defendant as to insurance fraud); *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975) (civil rights conspiracy), *cert. denied*, 425 U.S. 904 (1976). *See generally* 10A Wright & Miller, *supra*, § 2730, at 246-65.

As these courts recognize, "a party against whom summary judgment is sought is [not] entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the *requisite quantum of evidence* to enable him to reach the jury with his claim." *Hahn v. Sargent*, 523 F.2d at 468 (emphasis added).

Nor is summary judgment inappropriate merely because determination of a party's mental state may involve questions of credibility. In each of the cases cited above, as in the present case, the party opposing summary judgment had the burden of establishing the defendant's state of mind. It "would make a mockery of the summary judgment

procedure" to allow a plaintiff to avoid summary judgment merely by attacking the credibility of the defendant's denials or by suggesting that the defendant's affidavit may be false. Sonenshein, "State of Mind and Credibility in the Summary Judgment Context: A Better Approach," 78 Nw. U.L. Rev. 774, 797 (1983); *see also Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1966 ("[d]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion").

As demonstrated in Part II, *infra*, respondents brought forth no evidence, much less any "clear and convincing" evidence, that would call into question Charles Bermant's sworn statement that he believed each of the challenged passages to be accurate at the time he wrote them. Nothing in *Hutchinson v. Proxmire* suggests that respondents are entitled to any more solicitude than the law generally accords to claimants who have failed to provide the requisite quantum of evidence to reach the jury.

F. The Dictum In *Hutchinson v. Proxmire* Requires Reexamination In Light Of *Bose v. Consumers Union*.

Moreover, to the extent that the *Hutchinson* dictum assumed that the issue of "actual malice" is a "factual" question, peculiarly appropriate for resolution by a jury, that assumption requires reexamination after *Bose v. Consumers Union*.

In *Bose*, this Court held that the "clearly erroneous" standard governing "findings of fact" under Rule 52(a) does not apply to determinations of "actual malice" in a case governed by *New York Times v. Sullivan*. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1967. The Court recognized that state-of-mind issues, such as those involving discriminatory intent, are ordinarily viewed as questions of "fact" to which Rule 52(a)'s "clearly erroneous standard" would apply. *See Pullman-Standard v. Swint*,

456 U.S. 273 (1982). But although the trial court had concluded in *Bose* that the challenged article had been published with knowledge of its falsity or with reckless disregard of its truth or falsity, this Court characterized the trial court's determination as a matter of "constitutional judgment" requiring independent judicial evaluation. The constitutional stakes involved in such judgments, the Court held, are simply "too great to entrust them finally to the judgment of the trier of fact." *Bose v. Consumers Union*, _____ U.S. at _____ n.17, 104 S. Ct. at 1960 n.17. Without deciding whether the trial court's conclusion was "clearly erroneous," this Court exercised its "independent judgment" to determine whether the plaintiff had established "actual malice with convincing clarity," as required by *New York Times*. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1967. Finding "as a matter of law" that the record did not contain clear and convincing evidence that the challenged article had been prepared with knowledge of falsity or reckless disregard of the truth, this Court upheld the reversal of the District Court's judgment for the plaintiff.[18] *Id*.

The Court's refusal to treat a determination of "actual malice" as a finding of "fact" for purposes of Rule 52 carries over with equal force to the determination of whether "a

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18. In *Bose*, the Court took pains to underscore that it did not regard the trial court's conclusion as a "finding" of "fact." It upheld a reversal, even while accepting "all of the purely factual findings of the District Court . . . ." _____ U.S. at _____, 104 S. Ct. at 1967. It surrounded the word "finding" with quotation marks. *Id*. And it emphasized that the trial court's determination of actual malice, unlike its determination that the testimony of the article's author was incredible, was a "conclusion" rather than a "finding." And lest there be any doubt about its intentions, the Court adopted for purposes of "actual malice" cases Justice Harlan's conclusion in obscenity cases that "the question ... involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." _____ U.S. at _____ n.25, 104 S. Ct. at 1963 n.25 (quoting Roth v. United States, 354 U.S. 476, 497-98 (1957)) (emphasis in original).

genuine issue of material fact" exists under Rule 56 to defeat a motion for summary judgment. Indeed, *Bose*'s holding that "actual malice" was not a "fact" relied on *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), in which the Court held that the jury could not decide the question of the relevance of an allegedly libelous statement to the plaintiff's public figure status.

In the summary judgment area, courts have long recognized that not every issue of ultimate "fact" must be submitted to the jury. This is particularly so when the decision turns not so much on factors within the common experience of the jury, but rather on questions of policy where "consistency, uniformity and predictability . . . are important to the administration of the underlying laws." Schwarzer, *supra*, 99 F.R.D. at 472. This principle is particularly applicable to the *New York Times* test of "actual malice," which is laden with fundamental policy concerns. As this Court recognized in *Bose*, it is "imperative" that the "constitutional values" inherent in the *New York Times* rule, which assumes its content only "through the evolutionary process of common law adjudication," be "protected" by judges at all levels who are sensitive to these important policies. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1960.[19]

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19. Acceptance of a significant role for judges in summary judgment libel cases does not mean that there is no role for juries on state-of-mind issues. In cases, unlike the present one, where there is a dispute about underlying "historical" facts, such as what information a publisher relied upon, what steps were taken to confirm information, and whether contrary information was brought to a publisher's attention, summary judgment would be inappropriate. These are questions whose resolution require no special judicial competence and reflect no particular policy considerations. As *Bose* recognizes, however, juries have no special competence in determining what actions are sufficient to strip an author's work of constitutional protection.

II. No Reasonable Jury Could Find, Let Alone Find With "Convincing Clarity," That The Challenged Statements Were Published With Actual Malice.

Because the Court of Appeals applied an erroneous legal standard for determining whether respondents had met their burden of raising a jury issue, its judgment must be reversed and the District Court's judgment must be reinstated. No jury could conclude on the facts presented that respondents had adduced "clear and convincing evidence" that petitioners knew their statements were false or that they "subjectively entertained serious doubt about the truth" of these statements. *Bose v. Consumers Union*, _____ U.S. at _____ n.30, 104 S. Ct. at 1965 n.30. Respondents have failed to make the required showing. Regardless of the appropriate legal standard for this determination, *see supra* section I, the District Court properly granted summary judgment. Indeed, there is no evidence, let alone any "clear and convincing evidence," from which a reasonable jury could infer that petitioners knew their statements were false or "entertained serious doubt" about their truth.

A. Respondents Failed To Carry Their Burden Of Demonstrating Petitioners' "Actual Malice."

In support of their motion for summary judgment, petitioners relied primarily on the affidavit of Charles Bermant, the author of the challenged articles and the person upon whose judgment petitioners relied for the articles' accuracy.[20] Bermant's affidavit, and its attachment, set forth in detail the bases for Bermant's belief that each of the challenged passages was true. In response, respondents proffered three affidavits, two of which asserted that certain passages in the articles were untrue. (J.A. 100-101 [Carto

20. The Court of Appeals agreed that "Anderson was entitled to rely on Bermant's research, unless he had reason to doubt Bermant's accuracy. No such reason was presented by the record here." 746 F.2d at 1575.

Aff. ¶¶ 4, 5, 6,[21]; J.A. 108 [Jobe Aff.].) In the third affidavit, a former *Investigator* editor stated that he told one of the petitioners that a draft of the challenged articles was "ridiculous" and "terrible." (J.A. 94 [McGaw Aff. ¶ 13].) None of these showings was sufficient to create a factual dispute about petitioners' belief as to the truth of the articles.

Indeed, respondents made no showing whatsoever that could raise a factual issue as to petitioners' belief about the truth of a barrage of grave allegations going to the heart of respondents' operation. These allegations, all from reputable sources, include the following:

—Carto is the "ringleader" of "a nest of Nazis," a "known admirer of Adolf Hitler," and a "professional bigot" and "racist" who wants a "national socialist dictatorship in the United States." (J.A. 51, 55, 78 [Bermant Aff. Appx. 4, 8, 31].)

—Carto's ultimate objective is "domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto." (J.A. 77 [Bermant Aff. Appx. 30].)

—Liberty Lobby is an "organization of the fascist right" whose newspaper "disseminates an array of racist, anti-Semitic literature propaganda . . . [but makes an] effort to camouflage the true bigotry of its pages. . . ." (J.A. 54, 55 [Bermant Aff. Appx. 7, 8].)

—Liberty Lobby's "Operation Survival" was a "plan to establish a right-wing military dictatorship." (J.A. 74 [Bermant Aff. Appx. 27-28].)

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21. Carto's affidavit also asserted that he had sued the publisher of one of the articles on which Bermant relied and had settled the case to his satisfaction. (J.A. 101 [Carto Aff. ¶¶ 8, 9].) As we discuss below, this showing is inadequate to raise a triable issue as to petitioners' reliance on this source. *See infra* pages 38-39.

—A $50,000 "reward" offered by an "Institute" Carto helped found was a "gimmick to gain publicity for the institute's causes." (J.A. 65 [Bermant Aff. Appx. 19].)

The Court of Appeals recognized that each of these allegations came from "reputable" sources. 746 F.2d at 1576-77. It therefore concluded that no reasonable person could doubt that Bermant believed the mosaic picture of respondents as Hitler-inspired racists and anti-Semites who were covertly dedicated to the destruction of our national freedoms and institutions. In the face of this finding, the court nevertheless reversed the award of summary judgment as to nine details in these articles that lent further color to this picture. Although Bermant drew each of these details from a variety of sources, the court concluded that these details had not been adequately corroborated, that a jury could reasonably conclude that the sources for these details were unreliable, and that Bermant's reliance on these sources was evidence of actual malice.

Even under the lessened burden the Court of Appeals thought proper in a summary judgment case, the court seriously misapplied the First Amendment principles embodied in *New York Times* and subsequent cases.

Under this Court's clear holdings, a failure to investigate the accuracy of the details printed in the articles, or to corroborate the sources from which those details were drawn, is not evidence of actual malice where, as here, nothing in the sources' character, or in the picture of respondents' activities they portrayed, contained any "obvious reasons to doubt" their reliability or accuracy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *St. Amant v. Thompson*, 390 U.S. at 732-73; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (per curiam). To the contrary, the details of respondents' operation provided by Bermant's sources were entirely consistent with the overall depiction of respondents that emerged from the box full of materials which Mr. Bermant consulted. Under the

circumstances, there is no basis whatsoever to question Mr. Bermant's belief that the portrait he had drawn was "substantially correct." *New York Times v. Sullivan*, 376 U.S. at 286.[22]

B. No Reasonable Jury Could Find That Petitioners Seriously Doubted The Reliability Of The Information They Received About The Details Of Respondents' Activities.

Faced with the grave and sweeping nature of allegations from many reliable sources — allegations that went to the core of respondents' operation and pictured respondents as Hitler-inspired racists and anti-Semites — no reasonable jury could have doubted petitioners' belief as to the truth of nine details used in their articles to illustrate the larger picture.

1. Respondents' Obsession With Secrecy and Their Use of "Fronts"

For six examples of Carto's obsession with secrecy and use of interlocking "fronts" for his activities, Bermant drew upon an article written by Robert Eringer. The nature of Bermant's reliance on Eringer's information, as set forth in his affidavit and deposition testimony, is undisputed.

Eringer was a freelance writer who had published a book, written investigatory articles on the Ku Klux Klan

22. In analyzing the constitutional test of "actual malice," *New York Times* echoed the established tort law principle that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." Restatement (Second) of Torts, § 581A, comment (f) (1977). *See also* Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976) (embellishment to add "color or interest" to article is without legal significance). If a jury that finds the "sting" of an allegation to be true cannot impose liability for mere inaccurate details, surely a reporter who lawfully accepts the picture of his subject as a Hitler-inspired racist and would-be dictator cannot be considered to have doubted reports that further illustrate that picture.

and other subjects, and had completed an article about Liberty Lobby that had been partially published in *Mother Jones* magazine. (J.A. 261-62 [Bermant Dep. Tr. 71-72].) Bermant asked to see Eringer's written work, and upon reviewing it found Eringer to be an experienced reporter, who had interviewed many people and had done a great deal of research on his Liberty Lobby story. (J.A. 263 [Bermant Dep. Tr. 73].) Bermant also found that many of the key facts about Liberty Lobby appearing in Eringer's article were corroborated by sources Bermant had independently consulted, including articles in the *National Review* and the *Washington Post*. (*Id.*).

That the District Court had only Bermant's "word" for these facts, 746 F.2d at 1378, is no ground for ignoring his account absent any evidence that would call into question the truth of Bermant's sworn statements. And although respondents deposed Bermant, there is nothing in his deposition testimony that raises any question about the truthfulness of his account of his dealings with Eringer. *See generally* 6 Moore's Federal Practice, *supra*, ¶ 56.15[4].

Even though respondents controverted none of these facts, the Court of Appeals nonetheless concluded that a jury "could" find that Bermant's reliance on Eringer's material demonstrated a degree of recklessness sufficient to establish actual malice. 746 F.2d at 1378. The court reached its conclusion primarily because Mr. Bermant did not ask Eringer to disclose his sources of information and never "looked [him] in the eye . . . ." *Id.* at 1379. Neither of these factors is sufficient to raise a triable issue as to Bermant's reliance on Eringer's material, much less to constitute "clear and convincing evidence" of Bermant's disregard for the material's truth or falsity.

In the first place, the Court of Appeals mischaracterized the nature of Bermant's reliance on Eringer's information. Eringer was not an "anonymous" informant, reliance on whom this Court suggested in *St. Amant v. Thompson*, 390 U.S. at 732, could give rise to an inference of actual malice. Eringer was a professional journalist who

was reporting on the basis of what appeared to be his own substantial research. An experienced journalist himself, Bermant regarded Eringer as "obviously a professional reporter" and "quite an impressive source." (J.A. 286 [Bermant Dep. Tr. 116].) Eringer was paid $250 for his story, further confirming that he was not viewed as a mere "informant." It is undisputed that Anderson has never paid money to an informant, but would only pay money to a "professional newsman, who was doing a professional job." (J.A. 199 [Anderson Dep. Tr. 76].)

In light of these uncontroverted facts, it is insignificant that Bermant did not meet Eringer until after *The Investigator* articles were published. Bermant regarded Eringer as a professional reporter, and upon reviewing his writings, saw the work of a thorough and impressive journalist. He had no need to "look[]. . . Eringer in the eye."

The descriptions in Eringer's article upon which Bermant relied were far from being "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant* v. *Thompson*, 390 U.S. at 732. Compared with what Bermant already knew about Carto's and Liberty Lobby's operations from many other sources whose reliability stands unchallenged, *see supra* pages 28 through 29, the supposedly "scurrilous" allegations derived from Eringer's article are tame. *Cf. Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 138 (1967) (noting the "devastating nature of the article's assertions"). These allegations could "not have seemed unreasonable to one familiar with . . . prior publicized statements on the underlying controversy." *Associated Press* v. *Walker*, 388 U.S. 130, 159 (1967).

The Court of Appeals found defamatory and unreliable Eringer's report, reprinted by Bermant, that Carto secretly observed employees through a one-way mirror. 746 F.2d at 1578 (*see* J.A. 17 [Complaint, Count One,

¶ 14(XXIII)].)[23] This allegation could scarcely be regarded as "improbable" or "scurrilous" in light of the indisputably reliable information provided to Bermant by a ranking Liberty Lobby official that respondents illegally used lie detector and voice stress tests on current and prospective employees as a means of ensuring "loyalty and operational security." (J.A. 72-74 [Bermant Aff. Appx. 25-26]); *see* 746 F.2d at 1577.[24] Indeed, the essence of both allegations is the same: that respondents were so concerned about internal security that they adopted intrusive measures to guard against disloyalty.

The same observations apply to the allegation that Carto "conducts his business by way of conference calls from a public telephone." (J.A. 15 [Complaint, Count One, ¶ 14(XIII)].)[25] This allegation cannot be regarded as "inherently improbable" respecting Carto, who was said by another reliable source to be secretly planning to establish a dictatorship. 746 F.2d at 1577. This is especially so in light

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23. This description was accompanied by an illustration of Carto, which was separately challenged. (J.A. 16 [Complaint, Count One, ¶ 14 (XIX)].)

24. The use of such tests is unlawful in the District of Columbia, where Liberty Lobby is headquartered, and is punishable by a fine, imprisonment, or both. D.C. Code §§ 36-801 to 803 (Michie 1981). Respondents have conceded that they engaged in such unlawful activities. Plaintiffs' Answers to First Set of Interrogatories by Defendants, ¶ 15(d).

25. The Court of Appeals' conclusion that a jury would regard this statement as implying criminal conduct by Carto is baseless. It is hard to imagine how a statement that Carto conducts business from public telephones "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). At most it would seem to portray Carto as either security conscious and fearful of eavesdropping, or reclusive. Neither portrayal rises to the level required by the Restatement, and the latter portrayal of Carto as reclusive was specifically held by the Court of Appeals to be nondefamatory. 746 F.2d at 1572 (allegation 4).

of the repeated descriptions of Carto by the *National Review* and the *Washington Post* as "reclusive," and the incessant concern for "operational security" revealed by the Chairman of Liberty Lobby's own Board of Policy. (*See* J.A. 72-73 [Bermant Aff. Appx. 25-26].)

Nor could any reasonable jury regard as implausible the allegation that a Carto front organization supported G. Gordon Liddy's 1968 Congressional Campaign. (J.A. 15 [Complaint, Count One, ¶ 14(XIV)].[26] This allegation is fully consistent with information that Bermant acquired from numerous sources that Carto uses a variety of "front" organizations to advance his political goals, and indeed used the very front organization identified by Eringer for other political purposes. (*See, e.g.*, J.A. 34, 39 [Bermant Aff. Appx. 7, 13].) Liberty Lobby's involvement in partisan political activity was also known to Bermant through Liberty Lobby's own report that it had been found to have violated federal election laws. (J.A. 83 [Bermant Aff. Appx. 36].)

The allegation in Eringer's article, on which Bermant relied, that a story in a Liberty Lobby house organ, *The Spotlight*, was a "total hoax," (J.A. 18 [Complaint, Count One, ¶ 14 (XXVII)]), is likewise fully consistent with what Bermant learned from other sources, both individuals and published articles: that Carto had previously participated in other hoaxes. (*See* J.A. 64-72 [Bermant Aff. Appx. 18-25]; J.A. 342 [Drosdik Dep. Tr. 7-8].) Indeed, Bermant had the word of Carto insiders on at least two such hoaxes. The *Los Angeles Times* reported that the director of the Institute for Historical Review, who acknowledged the "close connection" between the Institute and Carto, "admitted

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26. The Court of Appeals apparently thought that since Liddy engaged in criminal conduct during the 1972 Presidential campaign, the organization's association with him might therefore appear to carry a defamatory implication. 746 F.2d at 1578. However, the alleged association between the two groups occurred four full years prior to Liddy's criminal activity. Thus, nothing about the organization's alleged support of Liddy's 1968 campaign would seem to harm Carto's reputation.

. . . that the reward [offered by the Institute to anyone who could prove that the Holocaust had occurred] was a gimmick." (J.A. 64-67 [Bermant Aff. Appx. 18-21].) The hoax allegation was also consistent with Eringer's report that Carto had staged a trumped-up "protest" against Yugoslavia's Marshal Tito, using one of his employees to masquerade as a "Croatian exile." This allegation, which respondents never challenged, was later confirmed by the testimony of a former Carto employee. (J.A. 342 [Drosdik Dep. Tr. 7-8].)

The final allegation for which Eringer was a source involves the statement that Carto "owned" the Government Education Foundation (GEF) to which Liberty Lobby paid $6,000 rent per month. (J.A. 14-15 [Complaint, Count One, ¶ 14(XI)].) Eringer's information supporting this allegation was substantially corroborated in the *Washington Post* and the *National Review*, which reported that GEF is "Liberty Lobby's landlord" and the "sole owner . . . of Liberty Lobby's building," and that "Carto signed as Chairman of GEF when GEF purchased the Liberty Lobby building." (J.A. 57-58 [Bermant Aff. Appx. 11-12].) To the extent that Eringer's statements went beyond what was reported in those two articles, respondents have pointed to nothing that would likely have led Bermant to doubt the truth of Eringer's statements. Even if Eringer's information were not corroborated in all respects, this lack of corroboration would not be evidence of "actual malice." *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 332; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. at 83-85. To the contrary, as this Court recognized in *St. Amant v. Thompson*, 390 U.S. at 733, partial verification of a story is evidence supporting the *absence* of "actual malice."

Two additional concerns raised by the Court of Appeals deserve only brief mention. Although the court stated that "Anderson admits that he did not care whether Eringer was reliable," 746 F.2d at 1579, this statement distorts

Anderson's testimony[27] and improperly relies on his supposed "admission." Anderson did not write the challenged articles and did not check their facts. He relied on the accuracy of his reporters and on his reporters' efforts to satisfy themselves that the information they had received was reliable. (J.A. 212-13 [Anderson Dep. Tr. 101].) What *Anderson* did or did not believe about Eringer's reliability is therefore irrelevant to what *Bermant* believed; and although respondents deposed both Anderson and Bermant, there is nothing in the record to indicate that Anderson and Bermant ever discussed Eringer or Bermant's reliance on Eringer as a source of information for the articles.

The Court of Appeals also improperly questioned Eringer's reliability because it believed that Eringer, unlike Bermant's other sources, could not have been deposed. In the first place, the court had no basis for this belief. That Eringer was living abroad would not have prevented respondents from taking his deposition pursuant to Rule 28(b)[28], and while respondents did not take his deposition, they never claimed that Eringer could not be found. Second, even if Eringer were in fact unavailable as a deposition witness in 1982, that would have no bearing on whether Bermant had any reason to doubt Eringer's reliability in 1981.[29]

Finally, the Court of Appeals' assumption that Eringer was unavailable for depositions is surely no excuse for holding a trial. The purpose of summary judgment is to assess

27. Anderson never testified that he didn't care whether Eringer was reliable. His testimony was that his own belief about Eringer's reliability "wouldn't have mattered," since he was relying on *Bermant's* work and not that of Eringer or any other individual source. (J.A. 185, 194 [Anderson Dep. Tr. 51, 67].)

28. Rule 28(b) permits depositions to be taken in a foreign country by notice, commission, or a letter rogatory.

29. The Court of Appeals' distinction between Eringer—whom the court said was unavailable to be deposed—and Bermant's other sources—who, being present in this country, could have been deposed—rings particularly hollow in light of the fact that respondents never bothered to depose the latter sources.

the proof to determine "whether there is a genuine need for trial." Advisory Committee's Note to Rule 56, 31 F.R.D. at 648. If Eringer could not be deposed, why should he be expected to be available as a trial witness? The unsupported hope that a witness might turn up is utterly inadequate to demonstrate a "need for trial." *See* 6 Moore's Federal Practice, *supra*, § 56.15[4], at 56-424 to 56-425.

2. Carto's Affinity With Hitler

The Court of Appeals also held that a trial was required to resolve two allegations relating to Carto's affinity with Adolf Hitler. The first of these was an illustration depicting Carto in a manner respondents claim looks like Hitler. (J.A. 16 [Complaint, Count One, ¶ 14(XIX)].) The second was a passage in the challenged article describing a gathering at which Carto was said to have joined in the singing of the infamous "Horst Wessel Lied," and to have delivered a speech in which he emulated Hitler's style. (J.A. 19 [Complaint, Count One, ¶ 14(XXIX)].)

Even if the illustration could reasonably be viewed as making Carto look like Hitler, which it cannot, the illustration cannot be said to have been published with actual malice in light of the ample information petitioners had from a multitude of sources, sources whose reliability respondents have not challenged, that Carto admired Hitler (J.A. 51, 78, 88-89 [Bermant Aff. Appx. 4, 31 and 41][30]) and that Carto's "dream was to succeed the Fuehrer as savior of the 'Aryan race'. . . ." (J.A. 77 [Bermant Aff. Appx. 30].) Given that respondents did not prevail on the allegation that Carto greatly admired Hitler and sought to succeed him, they can scarcely prevail merely because the illustration might bring home the link between Carto and Hitler more vividly to the reader. *See supra* notes 22, 30.

With regard to the written description of Carto's singing a song and making a speech, the Court of Appeals held

30. The Court of Appeals upheld summary judgment on the allegation that Carto was a "Hitler fan." 746 F.2d at 1576.

that petitioners were on notice of the description's probable falsity because the description was taken from an article co-authored by Joseph Spear, an *Investigator* editor, and previously published in *True* magazine, which had been the subject of a libel suit that was "settled to Carto's satisfaction." 746 F.2d at 1578. The Court of Appeals was wrong both factually and legally.

Although the specific descriptions of Carto singing the "Horst Wessel Lied" and emulating Hitler were derived from the *True* article, petitioners had ample information from other reliable sources, including both the *Congressional Record* and the *National Review*, that Carto had been the guest of honor at a gathering at which the guests sang the "Horst Wessel Lied," and that Carto had thereafter delivered an anti-Semitic speech. (J.A. 84 [Bermant Aff. Appx. 36-37].) In light of Carto's well-documented admiration for Hitler, no reasonable jury could doubt that, to Bermant, the articles' description of Carto's behavior rang true.

That the *True* article had itself been the subject of a libel suit could not have put petitioners on notice of the unreliability of that article's description of Carto's activities at the "Horst Wessel" party. In the first place, there is no evidence that petitioners were aware of the *True* litigation or settlement.[31] Second, there is no evidence that the *True* litigation revolved around the descriptions of Carto's behavior that have been challenged in the present litigation.

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31. Although Joseph Spear, one of the *True* article's authors, was later employed by *The Investigator*, Spear was never served with a copy of the complaint in the *True* litigation, never entered an appearance and did not sign the settlement agreement or the stipulation of dismissal. For the convenience of the Court, the Petition for Removal and the Stipulation and Order of Dismissal have been lodged with the Office of the Clerk of the Supreme Court.

No reasonable inference can be drawn that Spear had notice of the *True* litigation. Notably, although respondents had a year of discovery in which to inquire as to Spear's knowledge, they chose not to do so.

Respondents did not challenge every passage in *The Investigator* articles, and there is no reason to conclude that they had challenged the particular passages in the eight-page *True* article on which Bermant drew.[32] That an article has been challenged in some respects scarcely calls into question every passage in the article. This is especially so where, as here, the *True* report was substantially corroborated by other reliable sources.[33]

3. Carto's Plans for Sending American Blacks "Back to Africa"

The Court of Appeals also held that a jury question existed concerning whether the articles' allegation that Carto's "repatriation" scheme envisioned the "forced deportation" of blacks to Africa was made with actual malice. 746 F.2d at 1578. The court recognized that Bermant's sources support the allegations that (1) Carto created the

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32. Although Carto's affidavit refers to a "compensatory" article that *True* published as part of the settlement, (J.A. 101 [Carto Aff. ¶ 8]), this "article" is simply an interview with two Liberty Lobby employees and in no sense can be regarded as a retraction of anything in the prior article. (*See* J.A. 103-107.)

33. In any event, even were Spear a party to the settlement, his participation in the *True* settlement would be irrelevant to the present proceedings. Rule 408 of the Federal Rules of Evidence provides that evidence of a compromise or settlement "is not admissible to prove liability for or invalidity of the claim or its amount." The Advisory Committee's Note following Rule 408 provides two underlying principles for the rule: (1) that the evidence is irrelevant, since a settlement offer "may be motivated by a desire for peace rather than from any concession of weakness of position," *see* Sternberger v. United States, 401 F.2d 1012, 1018 (Ct. Cl. 1968); and (2) that there exists a strong "public policy favoring the compromise and settlement of disputes," *see* Perzinsky v. Chevron Chemical Co., 503 F.2d 654, 658 (7th Cir. 1974). *See generally* 23 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5302 (1980 and Supp. 1985). Given these substantial policy concerns, an inference that the *True* settlement gave Spear reason to doubt the truth of the *True* article simply may not be drawn.

Joint Council for Repatriation, and (2) the Council's purpose was to "send[] American blacks back to Africa." *Id.* However, because one of Bermant's sources referred to the scheme as one for "voluntary repatriation," the court thought that a triable question remained whether Bermant's characterization of the scheme as envisioning "forced deportation" was made with actual malice.

Contrary to the conclusion of the Court of Appeals, Bermant had no reason to doubt that his characterization of Carto's scheme as envisioning "forced" deportation was accurate. Bermant relied, *inter alia*, on a declaration filed in another lawsuit by California lawyer William Cox, a former police officer and Justice Department official, which stated that the "Joint Council for Repatriation" was "for the *deportation* of American Blacks to Africa."[34] (*See* J.A. 313 [Cox Dep. Tr. 20] (emphasis added)).

That one source characterized Carto's "repatriation" scheme as "voluntary" does not mean that Bermant was required to reject Cox's characterization, especially in light of credible information from many other sources that Carto covertly sought to establish a dictatorship, "secretly promoted" the Joint Council, and feared grave harm to his operations if news of the Joint Council's connection with Liberty Lobby were revealed. (J.A. 61-62 [Bermant Aff. App. 15].) In light of what he had learned about respondents' other activities, including their use of front organizations to disguise their true purposes, *see supra* pages 30-37, Bermant's characterization of Carto's scheme as one for forced deportation was surely a "possible rational interpretation[]" giving a jury no leeway to draw a conclusion that he wrote with actual malice. *Time, Inc. v. Pape*, 401 U.S. at 290; *see also Bose v. Consumers Union*, ____ U.S. at ____, 104 S. Ct. at 1966.

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34. The Court of Appeals correctly recognized that Cox's role as an attorney representing a party in litigation with respondents does not render him unreliable. 746 F.2d at 1576 n.13.

CONCLUSION

The Court of Appeals wrongly concluded that the standards for evaluating whether a public-figure libel case could reach the jury on the issue of "actual malice" are different from the standards that must be applied in evaluating a motion for a directed verdict. The constitutional standard of "clear and convincing evidence" must be applied before trial on a motion for summary judgment, at trial on a motion for a directed verdict, after trial on a motion for judgment n.o.v., and on appeal.

Because respondents failed to adduce *any* evidence, let alone any "clear and convincing evidence," that petitioners' articles were published with "actual malice," the District Court correctly entered summary judgment for petitioners.

For the reasons described above, we respectfully request that the order of the Court of Appeals be reversed.

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Respectfully submitted,

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